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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 738

CHARLES H. DENNY, ET UX, DOROTHY MAE DENNY,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Western District of Texas rendered no opinion in this case. The opinion of the Court of Appeals for the Fifth Circuit (R. 26-29) is reported at 171 F. 2d 365.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 17, 1948 (R. 29). A petition for rehearing was denied on January 21, 1949 (R. 36). The petition for a writ of certiorari was filed on April 18, 1949. The juris-

diction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the failure to furnish free Army medical and ambulance service to an Army officer's wife is a failure to perform a "discretionary" function, and thus within the exceptions set forth in Section 421(a) of the Federal Tort Claims Act.

2. Whether, assuming that the failure to furnish such service does not fall within the exception, petitioners may recover for the negligent death of a stillborn child where such recovery is not allowed by applicable state law.

STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act[1] are set out in the Appendix, *infra*, p. 11.

STATEMENT

Petitioners' claim for damages is based upon the birth of a stillborn child. In their "Complaint for

[1] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. 921 *et seq.*) was repealed, and its provisions were revised and reenacted into law as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948 (Pub. Law 773, 80th Cong., 2d sess.). Section 39 of the repealing act provides that existing rights and liabilities shall not be affected by the repeal. Since the case at bar arose prior to the repeal, any rights which petitioner may have against the United States are governed by the Federal Tort Claims Act as it existed at the time of the repeal. It is the former provisions of the Act, therefore, which are set out in the Appendix, *infra*, p. 11.

Negligent Death", filed on August 1, 1947 in the United States District Court for the Western District of Texas, and brought under the Federal Tort Claims Act, petitioners, as the "natural father and mother and next of kin of their infant son, Joseph Denny, who is now deceased," alleged that petitioner Charles H. Denny was an Army officer; that the Brooke General Hospital (an Army hospital in Fort Sam Houston, Texas) had agreed to furnish his wife, petitioner Dorothy Mae Denny, with prompt medical attention during her pregnancy; that the hospital was negligent in failing to dispatch an ambulance immediately upon her beginning labor on December 16, 1945; and that as a result of such negligence she gave birth on that day to a child "which was dead at the time of its birth" (R. 2-3).

In addition to filing an answer denying negligence, the United States moved to dismiss the complaint on two grounds: (1) the furnishing of medical service to an Army officer's wife was a discretionary function within the exclusion contained in Section 421(a) of the Federal Tort Claims Act exempting claims based upon the failure to perform a discretionary function; and (2) the complaint fails to state a cause of action because no duty was owed by the United States to furnish petitioners with medical service.

At the argument on the motion to dismiss, petitioners agreed that the only "act of negligence charged" in the complaint was the Army hospital's

failure to "dispatch an ambulance to [Mrs. Denny] when she was beginning labor, and that as a result of such negligence that the child was still-born" (R. 10). Petitioners further stated that they were "damaged by reason of the fact that the child died by reason of [the Army hospital's] negligence" in failing to dispatch the ambulance at the proper time (R. 11). The district court, at the conclusion of the argument, dismissed the complaint, and thereafter also denied petitioners' "Motion for a New Trial and Reinstatement of the Case" (R. 11, 12, 17).

On appeal, the court below affirmed. It held that the furnishing of medical service to Army dependents is a discretionary function and that any negligent breach in failing to extend such service is not actionable because of Section 421(a)'s express exclusion of claims resulting "from the failure to perform a mere discretionary function or duty, even though the discretion involved be abused" (R. 28). Judge Sibley concurred on the independent ground that the complaint "does not allege any injury save that the child died in birth, which is not an actionable injury in Texas" (R. 29).

ARGUMENT

Petitioners, in seeking review of the affirmance by the court below of the trial court's dismissal of the complaint, urge two reasons in support thereof (Pet. 8-10). First, petitioners contend that both courts below erred in deciding that their claim is

not covered by the Act because of the Act's exception of claims based on the failure to perform a discretionary function. Second, they urge that the court below improperly treated their complaint as one alleging only a wrongful death action. Both contentions are, we submit, lacking in merit and further review by this Court is unwarranted.

1. *A claim of the character here asserted by petitioners is not comprehended by the Federal Tort Claims Act.* The first of the twelve express exceptions set forth in the Federal Tort Claims Act, Section 421(a), excludes, *inter alia,* "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused" (See Appendix, *infra,* p. 11). As stated by the court below, the Act of July 5, 1884 (23 Stat. 112, 10 U.S.C. 96), which authorizes free Army medical service to Army officers' dependents "whenever practicable", "clearly stamps the obligation of the Government to provide medical service to Army dependents as discretionary in character" (R. 28). Accordingly, since the claim here involved is one "based upon . . . the failure to * * * perform a discretionary function", both courts below properly viewed it as falling within the express exclusionary language of Section 421(a).

In an endeavor to show that the function is not discretionary, petitioners refer to the provision of

the 1884 Act to the effect that Army medical officers "shall whenever practicable attend the families of the officers," and argue that use of the word, "shall" makes the function a mandatory one (Pet. 9-10). This argument, of course, completely overlooks the judgment and discretion which must be preliminarily exercised in determining the practicability of rendering medical aid. Cf. *United States* v. *Seaman*, 17 How. 225. This latitude and broad discretion may not, of course, be negatived by simply underscoring the word "shall". *Hecht Co.* v. *Bowles*, 321 U.S. 321; *The People ex rel. Sheppard* v. *Dental Examiners*, 110 Ill. 180; *Lloyd* v. *Ramsay*, 192 Iowa 103.

2. *Petitioners' contention that the complaint should be read as embracing some cause of action other than one for the wrongful death of their child, is unsupportable.* The Federal Tort Claims Act subjects the United States to liability for the negligent or wrongful acts of its employees to the same extent that a private employer would be liable "in accordance with the law of the place where the act or omission occurred." (Section 410(a), Appendix, *infra* p. 11). By so incorporating the *lex loci delicti* into the Act, the courts are required to refer to the local statutory and decisional law in determining whether a tortious and actionable wrong has been committed. *State of Maryland* v. *United States*, 165 F. 2d 869, 871 (C.A. 4); *Long* v. *United States*, 78 F. Supp. 35, 37 (S.D. Calif.); *Parmiter* v. *United States*, 75 F. Supp. 823, 824

(D. Mass.); *Wiltse* v. *United States,* 74 F. Supp. 786, 787 (W.D. La.); *Spell* v. *United States,* 72 F. Supp. 731 (S.D. Fla.). See, also, *Cuba Railroad Company* v. *Crosby,* 222 U.S. 473, 479; *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347, 356. Since the alleged wrong here complained of occurred in Texas, it is the law of that state which governs. And under Texas law it is settled, as stated by Judge Sibley in his concurring opinion (R. 28-29), that no action lies for the death of a child resulting from injuries sustained before its birth. *Magnolia C.C.B. Co.* v. *Jordan,* 124 Tex. 347; see, also *Telegraph Co.* v. *Cooper,* 71 Tex. 507.[2]

The petition challenges neither the applicability of Texas law nor the inability, under that law, to maintain an action for the death of a child dying from injuries suffered before its birth. Instead, petitioners seek to avoid the impact of Texas law

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[2] Accord: *Dietrich* v. *Northampton,* 138 Mass. 14; *Gorman* v. *Budlong,* 23 R.I. 169; *Newman* v. *City of Detroit,* 281 Mich. 60; *Buel* v. *Railroad,* 248 Mo. 126; *Stanford* v. *St. Louis-San Francisco Ry. Co.,* 214 Ala. 611. These holdings, which preclude the child's parents from recovering for prenatal injuries to the child, rest on the child's inability, had it survived, to maintain a personal action for such injuries. See *Lewis* v. *Steves Sash & Door Co.,* 177 S.W. 2d 350 (Texas). It seems to be well-established that the infant who survives prenatal injuries is barred from maintaining a personal action for those injuries. *Drobner* v. *Peters,* 232 N.Y. 220; *Stemmer* v. *Kline,* 128 N.J.L. 455; *Allaire* v. *St. Luke's Hospital,* 184 Ill. 359; *Berlin* v. *J. C. Penney Co., Inc.,* 339 Pa. 547; *Lipps* v. *Milwaukee E. R. & L. Co.,* 164 Wisc. 272; see, also, Restatement, Torts, Sec. 869. *Contra*: *Bonbrest* v. *Kotz,* 65 F. Supp 138 (D. D. C.).

by contending here that their complaint was "broad and general", and intended to state a cause of action for direct personal injuries sustained by Mrs. Denny, who "has been nervous and upset ever since said incident and her health has been impaired" (Pet. 8). The record makes it perfectly clear, however, that the complaint stated a cause of action only for the allegedly wrongful death of the infant. The complaint itself was so captioned, *i.e.*, "Complaint for Negligent Death" (R. 2). Paragraph 2 of the complaint shows that suit was not filed by Mrs. Denny in a personal capacity for personal injuries sustained by her, but was in fact filed by Mrs. Denny and her husband "as the natural father and mother and next of kin of their infant son, Joseph Denny, who is now deceased" (R. 2). Nowhere in the complaint is there any allegation or indication of any personal injuries sustained by Mrs. Denny. The gravamen of the complaint is the death of the child allegedly resulting from the claimed negligent failure to dispatch an ambulance promptly (R. 3). During the argument on the motion to dismiss, counsel for petitioners expressly admitted that that was "the only act of negligence charged" (R. 10) and that they were "damaged by reason of the fact that the child died" (R. 11). In view of the unequivocal language of the complaint and counsel's candid admissions that it stated only what it purported to state, *i.e.*, a wrongful death action, there can be no basis for contending that the complaint must now be read

so as to state an entirely new and different cause of action. What petitioners now believe they might be able to prove, if permitted to go to trial, does not cure the vice of the complaint that it was an action for the wrongful death of their child and not an action for personal injury to Dorothy Mae Denny.[3]

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[3] Petitioners' contention (Pet. 8) that the district court should have heard the evidence before passing on the motion to dismiss, is untenable. A motion to dismiss for failure to state a claim upon which relief can be granted takes the place, of course, of the former demurrer. *Dennis* v. *Village of Tonka Bay*, 151 F. 2d 411, 412 (C.A. 8); *Ledbetter* v. *Farmers B. & T. Co.*, 142 F. 2d 147, 149 (C.A. 4), certiorari denied, 323 U.S. 719, rehearing denied, 323 U.S. 813. Like a demurrer, it admits all of the well-pleaded facts of the complaint, which are taken to be true for the purpose of the motion. *Tahir Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865, 867 (C.A. 4); *Leimer* v. *State Mut. Life Assur. Co.*, 108 F. 2d 302, 305 (C.A. 8); *Federal Life Insurance Co.* v. *Ettman*, 120 F. 2d 837, 839 (C.A. 8), certiorari denied, 314 U.S. 660. Since it would be absurd for the trial court to hear evidence concerning facts which it assumed to be true for the purpose of the motion, it is obvious that the court properly passed on the motion without hearing evidence.

CONCLUSION

The decision of the court below is correct. There is no conflict and further review is not warranted. The petition for the writ of certiorari should therefore be denied.

Respectfully submitted,

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MAY, 1949

APPENDIX

The pertinent provisions of the Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. 931, 943), provided as follows: [4]

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

SEC. 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omis-

[4] See fn. 1, *supra*.

sion of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

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